STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY A. GILBERT,

Defendant-Appellant.

UNPUBLISHED
September 4, 1998

No. 200103
Oakland Circuit Court
LC Nos. 96-143668 FH;
96-143675 FH

Before: Neff, P.J., and O'Connell and Young, Jr., JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a) (victim under thirteen years of age). Defendant was sentenced to two concurrent terms of three to fifteen years' imprisonment. He appeals as of right, and has filed a supplemental brief *in propria persona*. We affirm defendant's convictions and sentences, but remand for correction of defendant's presentence report.

This case arises out of sexual contact that occurred between defendant and complainant while complainant spent the night at defendant's apartment on various occasions. Complainant testified that during at least two of the visits defendant put his hand on complainant's penis, underneath all his clothes, while they were sleeping in defendant's bed. Complainant was eleven years old at the time.

I

Defendant first argues that there was insufficient evidence to support defendant's convictions. Defendant further asserts that his convictions were based on perjured testimony from complainant. We disagree.

In the present case, the prosecution was required to demonstrate that defendant engaged in sexual contact with complainant and that complainant was under thirteen years of age. MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). Sexual contact "includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the

victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification." MCL 750.520a(k); MSA 28.788(1)(k).

When viewed in a light most favorable to the prosecution, *People v Toole*, 227 Mich App 656, 658; 576 NW2d 441 (1998), the evidence presented by the prosecution was sufficient to establish that defendant intentionally touched complainant's penis, that the touching was done or could be construed as having been done for sexual purposes, and that complainant was under thirteen years of age. It is not disputed that complainant was under thirteen years of age at the time of the incidents. Complainant consistently testified that defendant touched his penis under his clothes while he was in bed with defendant.[1] He also testified that defendant asked him if he "played with himself" and that defendant began to rub his own penis in front of complainant. Complainant also stated that defendant showed him a picture of a naked woman on the computer. Complainant's parents testified about behavioral changes that they observed in complainant, and that they sought counseling for their son. Both complainant's sister and his counselor testified that complainant told them about how defendant had touched his penis. In statements to three different police officers, defendant himself admitted that he may have touched defendant's penis either accidentally or unconsciously. In addition, a large amount of material regarding sex and young boys was discovered in defendant's apartment and on his computer.

Although defendant testified that no touching ever occurred and he denied making statements to the officers that any touching was unconscious or accidental, the jury was free to reject defendant's testimony and find complainant's testimony to be more credible. *People v Wolfe*, 440 Mich 508, 516 n 6; 489 NW2d 748, amended 441 Mich 1201 (1992). Sufficient evidence was presented to sustain defendant's convictions.

II

Defendant next argues that the trial court abused its discretion in admitting other acts evidence pursuant to MRE 404(b). This evidence was retrieved from defendant's computer and bedroom, and included graphics files, magazines, e-mail messages, stories, and newspaper articles about young boys and sex.

A decision to admit evidence is within the sound discretion of the trial court. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). The standard for reviewing for an abuse of discretion is narrow: the result must have been so violative of fact and logic that it evidences perversity of will, defiance of judgment, or the exercise of passion or bias. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995).

MRE 404(b) governs the admissibility of "other acts" evidence. MRE 404(b)(1) provides, in pertinent part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent,

> preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident . . . .

This rule is one of inclusion. *People v Starr*, 457 Mich 490, 496; 577 NW2d 623 (1998), and "permits the judge to admit other acts evidence *whenever* it is relevant on a noncharacter theory." *People v VanderVliet*, 444 Mich 52, 64-65; 508 NW2d 114 (1993), modified 445 Mich 1205; 520 NW2d 338 (1994) (emphasis in original).

Our Supreme Court has established a four-part standard for determining the admissibility of 404(b) evidence: (1) the evidence must be offered for a proper purpose, which means it must be relevant to an issue other than propensity; (2) the evidence must be relevant to an issue or fact of consequence at trial; (3) the evidence must satisfy the balancing test of MRE 403—the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice; and (4) the trial court may, on request, provide a limiting instruction to the jury. *Id*. at 55.

In the present case, we find that the evidence at issue was offered for a proper purpose: specifically, to establish defendant's state of mind and intent, and to show the absence of mistake or an innocent intent. *Starr*, *supra* at 495. The other acts evidence introduced by the prosecution was highly probative of these facts of consequence, particularly in light of defendant's explanation to the police that he may have touched complainant accidentally or unconsciously.

Regarding the third prong, our Supreme Court has stated that the proper inquiry is "not whether the [evidence] was more prejudicial than probative, but whether the probative value is *substantially* outweighed by the risk of unfair prejudice." *Id* at 499 (emphasis in original). Here, we find that the proof of defendant's intent was particularly important in light of defendant's assertions to police that any touching was accidental or innocently done while defendant was asleep. The probative value of the challenged evidence was not substantially outweighed by the danger of unfair prejudice.[2] Accordingly, we find that the trial court did not abuse its discretion in admitting other acts evidence pursuant to MRE 404(b).

III

Defendant also argues that the trial court's initial limiting instruction to the jury concerning the other acts evidence improperly informed the jury that the evidence showed defendant's intent. We disagree.

After a careful review of the instructions in their entirety, we conclude that the trial court's initial limiting instruction properly informed the jury that they could use the other acts evidence to determine intent. Moreover, any imperfection in the initial instruction was cured where the trial court read the standard limiting instruction on two subsequent occasions, and also gave additional reminders to the jury regarding the proper use of the other acts evidence. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

IV

Next, defendant argues that he was deprived of a fair trial by the trial court's instruction regarding the possibility of replaying testimony. The trial court gave the following instruction after the jury was seated and sworn:

> Ladies and gentlemen, you'll see that there is – we are a video courtroom. You'll see that there is a video machine in our jury room. Do not assume you can have a replay of testimony. The reason I say that is because I have to shut down this courtroom to do it, and I don't have the time to do that. Because if you hear testimony that takes three hours, we have to start from beginning to end, and you have to hear the replay of the whole thing. And I have to assign a clerk in there full time with you. That's why I allow you to take notes.

The trial court may not completely foreclose the opportunity of having testimony replayed or reread. *People v Henry Smith*, 396 Mich 109, 110-111; 240 NW2d 202 (1976). Here, however, we find that the trial court's instruction in the present case did not completely foreclose the possibility of replaying testimony, and served to impress upon the jury the importance of paying attention to the testimony during trial. See *People v Johnson*, 124 Mich App 80, 89-90; 333 NW2d 585 (1983). Accordingly, we find no error here.[3]

V

Next, defendant asserts that the prosecutor committed misconduct that deprived defendant of a fair trial by eliciting testimony from a computer technician with the Michigan State Police about certain empty computer directories entitled "Devon." We disagree.

Although a prosecutor is permitted to vigorously argue his or her case based on the evidence presented, he or she "must refrain from injecting unfounded or prejudicial innuendo into the proceedings." *People v George*, 130 Mich App 174, 180; 342 NW2d 908 (1983). In the present case, the witness explained that a utility program was used to destroy all access to the deleted directories, but that he did not know who erased the files or whether any data was ever in the files. Further, no testimony was presented that "Devon" was the name of a minor who had alleged that defendant had molested him in an unrelated case. Reviewing the challenged remarks in context, *People v LeGrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994), we conclude that the prosecutor's actions did not deny defendant a fair trial.

VI

Next, defendant argues that the trial court failed to offer him adequate opportunity to challenge the accuracy of the information in the presentence investigation report. A criminal defendant has a due process right to be sentenced on the basis of accurate information. *People v Daniels*, 192 Mich App 658, 675; 482 NW2d 176 (1992). When a sentencing court states that it will disregard information in a presentence report challenged as inaccurate, the defendant is entitled to have the information stricken from the report. *People v Britt*, 202 Mich App 714, 718; 509 NW2d 914 (1993).

In the present case, defendant challenged a portion of the investigator's version of the offense which described alleged contact with a minor via the Internet. The sentencing court indicated that it would not consider the information when imposing sentence, but did not strike the challenged information from the presentence report. Accordingly, defendant is entitled to a remand for the sole purpose of having the information in question stricken from his presentence report.

VII

Defendant raises three additional issues in his supplemental brief *in propria persona*, none of which have merit.

A

Defendant argues that the trial court erred by refusing his request to have the jury instructed on the lesser offense of fourth-degree criminal sexual conduct, MCL 750.520e; MSA 28.788(5). Because the CSC II charge was premised on complainant's age, and the prosecutor did not charge a necessary element of CSC IV, such as force or complainant's mental incapacity, CSC IV is not a necessarily included offense. *People v Norman*, 184 Mich App 255, 260-261; 457 NW2d 136 (1990).[4]

Neither is CSC IV a cognate lesser included offense of CSC II under the facts presented here. *People v Hendricks*, 446 Mich 435 443; 521 NW2d 546 (1994). The trial court correctly determined that the record was barren of any evidence that would support a conviction of the lesser offense of CSC IV. The charged contact occurred while complainant was sleeping in defendant's bed, and the charges were premised on complainant's age at the time of the offense. Defendant's request for a jury instruction on the lesser offense of CSC IV was properly refused.

B

Defendant argues that the prosecutor committed misconduct by permitting complainant's counselor to testify and by appealing to the jury's sense of rage and justice. Because no objection was made to this testimony or to the prosecutor's closing argument, this Court may review the issue only if the failure to do so would result in a miscarriage of justice. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996).

Defendant insists that the prosecutor offered false testimony of the counselor because complainant admitted he had lied to her. We disagree with defendant's characterization. Although complainant admitted that he did not initially tell his counselor what occurred, this did not render his testimony perjurious; rather, as already discussed, the testimony raised a credibility issue for the jury to resolve. Moreover, after reviewing the prosecutor's closing argument, we have not discovered any remarks which could be deemed an improper appeal of the jury's sense of justice or rage, nor does defendant direct our attention to the particular portion of the prosecutor's remarks about which he complains. *People v Williams*, 228 Mich App 546; 580 NW2d 438 (1998) (party may not simply announce his position and leave it for this Court to discover and rationalize the basis for the claim).

C

Defendant's final argument is that his statements to Officer Swanderski that he touched complainant unconsciously should have been excluded because they were obtained in violation of his *Miranda*[5] rights. The critical inquiry in determining whether defendant's *Miranda* rights were violated is whether defendant was subject to custodial interrogation. *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995).

In the present case, it is not disputed that defendant was in custody. However, we find that defendant was not subject to interrogation. Interrogation "refers to express questioning and to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 532-533. Volunteered statements of any kind are not barred by the Fifth Amendment and are admissible. *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997); *Anderson, supra* at 532.

Here, Officer Swanderski testified that she engaged in casual conversation with the defendant and that she did not question him. It was defendant who raised the issue of why he was in custody and discussed the allegations against him. Because defendant's statement was volunteered and not the result of interrogation, the trial court did not err in admitting the statement.

Affirmed and remanded to the circuit court so that the challenged information, not relied on in sentencing, may be stricken from defendant's presentence report. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Peter D. O'Connell
/s/ Robert P. Young, Jr.

[1] We find that defendant's allegation that complainant gave perjured testimony mischaracterizes the testimony which was given at the preliminary examination and at trial.

[2] We note that defendant also contends that the trial court failed to balance the probative value with the prejudicial effect of the evidence. However, it is apparent from the record that the trial court did engage in this balancing process after it reviewed the evidence.

[3] Because we have determined that the instruction was not error, we find it unnecessary to address defendant's argument that he was denied effective assistance of counsel by trial counsel's failure to object to the instruction.

[4] Compare *People v Gorney*, 99 Mich App 199, 203-205; 297 NW2d 648 (1980), where this Court concluded that fourth-degree criminal sexual conduct was a necessarily lesser included offense where the second-degree criminal sexual conduct charge was premised on MCL 750.520c(1)(f); MSA 28.788(3)(1)(f), which requires the actor to cause personal injury to the victim and to use force or coercion to accomplish the contact.

[5] *Miranda v Arizona*, 384 US 426; 86 S Ct 1602; 16 L Ed 2d 694 (1966).